Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THOMAS FRANCIS GEPFRICH, Petitioner,

v.

MARJORIE LOIS GEPFRICH; JAMES FOX MILLER and MILLER & SCHWARTZ, P.A., Respondents

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Florida, annuities are exempt from creditors' claims and an insolvent debtor may convert nonexempt assets into an exempt property anytime before a judicial lien has attached - regardless of actual intent; Florida and the United States Congress [in the legislative history to 11 U.S.C. §522(b)] deem such conversions non-fraudulent as to creditors. The questions presented are:

1. Does 11 U.S.C. §727(a)(2)(A), which denies discharge for a debtor's fraudulent transfer of property before bankruptcy, require a bankruptcy court to apply the state law of fraudulent transfers - not federal decisional law - to a debtor's conversion of nonexempt cash into an exempt annuity moments before filing bankruptcy and thus, preclude denial of discharge for an asset conversion deemed non-fraudulent under state law?

2. In bankruptcy appeals, are the district court and court of appeals bound,

under the clearly erroneous rule, by a bankruptcy court's finding of fact that the debtor converted nonexempt cash into an exempt annuity with intent to defraud his former wife and her attorneys when under state law such conversion is deemed non-fraudulent?

3. If a debtor buys an exempt annuity moments before bankruptcy with an oral binder for annuity coverage, is the purchase valid against the trustee where (a) payment is made by cashier's check delivered before bankruptcy but (b) the contract is issued after bankruptcy?

Petitioner received for the sale of a business interest several years before bankruptcy cash, a five year employment contract and the right to borrow $3,080 monthly (with interest bearing notes) against his 25% share of the buyer's future profits operating the business. In the six months after his June 13, 1989 bankruptcy he drew $25,000 but his employer had no profits - only a $1.7 million loss for 1989. The questions

presented are:

4. Was the debtor's right to borrow the $25,000 property of the debtor's bankruptcy estate under 11 U.S.C. §541(a)?

5. If so, does 11 U.S.C. §541(a)(6), which excludes from the bankruptcy estate an individual debtor's post-bankruptcy earnings, bar the trustee from obtaining a $25,000 money judgment from the debtor where his right to borrow the $25,000 was conditioned on his rendering post-petition personal services?

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Thomas Francis Gepfrich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.-53) is unreported. The opinion of the district court (App.-44) is unreported. There are three July 6, 1990 opinions rendered by the bankruptcy court: its findings of fact and conclusions of law in Adv. Case No. 89-0433 (regarding denial of Petitioner's bankruptcy discharge) (App.-13) is reported at

118 B.R. 135. Its findings of fact and conclusions of law in Adv. Case No. 89-0465 (on invalidation of the annuity purchase as a post-petition transfer or fraudulent transfer) (App.-28) is unreported. Its memorandum decision sustaining objection and supplemental objection to exemptions (App.-5) is also unreported.

JURISDICTION

The court of appeals entered its judgment on October 19, 1993 (App.-53) and denied (App.-54) on November 30, 1993 a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The district court entered its judgment on August 20, 1992 (App.-44). The jurisdiction of the district court was invoked under 28 U.S.C. §158(a).

STATUTORY PROVISIONS INVOLVED

1. §222.11, Florida Statutes (Exemption of wages from garnishment) (App.-58)

2. §222.14, Florida Statutes (Exemption

of cash surrender value of life insurance policies and annuity contracts from legal process) (App.-58)

3. 11 U.S.C. §541 (Property of the estate) (App.-59)

4. 11 U.S.C. §548 (Fraudulent transfers and obligations) (App.-59)

5. 11 U.S.C. §549 (Postpetition transactions) (App.-60)

6. 11 U.S.C. §727 (Discharge) (App.-60)

STATEMENT

Petitioner, a Chapter 7 bankruptcy debtor, sued his ex-wife, Respondent Marjorie Lois Gepfrich and her attorneys, Respondents James Fox Miller and Miller & Schwartz, P.A., in an adversary suit to determine under 11 U.S.C. §523(a)(5)(B) that a $270,000 equitable distribution award to the ex-wife under a 1986 dissolution of marriage judgment was dischargeable and that some $59,000 in attorney's fees due her attorneys was likewise dischargeable. Respondents counterclaimed under 11 U.S.C. §727(a)(2)(A) for denial of discharge, alleging the Petitioner made a fraudulent transfer by purchasing a $49,000 annuity minutes before bankruptcy. Respondent Daniel Bakst, the bankruptcy trustee, filed a separate adversary suit against Petitioner to avoid the annuity purchase as a fraudulent transfer or, alternatively, as a post-petition transfer.

In a consolidated trial proceeding, the bankruptcy court denied Petitioner's

discharge, invalidated the annuity purchase, sustained all objections to his exemption claims and awarded the trustee, Respondent Bakst a $25,000 judgment against Petitioner. Petitioner appealed to the district court which affirmed (with an opinion) the bankruptcy court's ruling. Petitioner appealed to the court of appeals, which affirmed per curiam the district court's affirmance.

A. Denial of Discharge for Pre-Bankruptcy Planning (Asset Conversions on the Eve of Bankruptcy)

This case concerns a critical conflict in bankruptcy law - not previously addressed by the Supreme Court - between the power of bankruptcy courts to deny a debtor's discharge for fraudulent property transfers made in the year before bankruptcy and their duty to protect debtors' rights to enjoy state law-created privileges of exempting property from creditors' claims. Although the bankruptcy court has jurisdiction to decide the merits of an exemption claim, 28 U.S.C. §157(b)(2)(B),

the validity and scope of the exemption is controlled by application of state law. Holden v. Stratton, 198 U.S. 202, 213-14 (1905). Similarly, many federal courts have held that the question of whether a particular transfer of property by a debtor is fraudulent is determined by the law of the state where the transfer has occurred; this was so under the Bankruptcy Act[1] and remains the rule under the Bankruptcy Code.[2]

State exemptions vary widely from, e.g., the parsimonious allowances in the north-eastern states to the magnanimous allowances of states such as Texas and Florida.[3]

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[1] Engstrom v. Lowell, 281 Fed. 973 (1st Cir. 1922); Hale v. Hummel, 64 F.2d 210 (8th Cir. 1933)

[2] In re Universal Clearing House, Co., 60 B.R. 985 (Bankr. Utah 1986); In re Janis, 60 B.R. 349 (Bankr. S.D.Fla. 1986)

[3] Koger and Reynolds, Is Prefiling Engineering Prudent Planning or Section 727 Fraud? (Or, When Does a Pig Become a Hog?), 93 Comm. L.J. 465; Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L.Rev. 615 (1978).

The emerging development in bankruptcy practice that the instant case epitomizes is that in states with extremely liberal debtor's exemptions (such as Petitioner's state, Florida, where, e.g., Art. X, Sec. 4 of the Florida Constitution allows a debtor to own a 160 acre homestead and §222.14, Florida Statutes allows a debtor to own annuity contracts - both unlimited in dollar amount), some bankruptcy courts - like the court in this case - deny the debtor's discharge because the bankruptcy court concludes that the same conversion of nonexempt property to exempt that would be valid, i.e. not fraudulent as to creditors, under state law is accompanied by what the bankruptcy court labels "extrinsic fraud". [Even though the factual basis for the finding of "extrinsic fraud" would not render the same transaction voidable in state court by a judgment creditor, the debtor loses his discharge because the "clearly erroneous" rule renders the bankruptcy court's finding of "fact"

unassailable.]

B. Background; Origin of the Equitable Distribution (Property Settlement) Debt to Mrs. Gepfrich

Petitioner Thomas Gepfrich is a home builder whose June 13, 1989 voluntary Chapter 7 bankruptcy stems from a 1986 dissolution of his marriage to Respondent Marjorie Gepfrich ("Mrs. Gepfrich). The dissolution judgment awarded her periodic alimony and child support, divided the parties' properties and to make the division of marital assets equitable, awarded Mrs. Gepfrich an additional equitable distribution/lump sum property settlement award of $270,000, payable over 38 months. The judgment denied her request that these obligations be secured by a lien but allowed her to request such lien if Petitioner thereafter defaulted.

C. Background; Origin of Petitioner's $50,000 Certificate of Deposit ("the C.D.")

In September, 1987, Petitioner and Ron Blum sold their 100% stock interests in Heritage Quality Construction Co., Inc.

("Heritage") to Ambassador Real Estate Equities Corporation ("Ambassador"). Petitioner received $124,700.50; he and Blum also received five-year employment contracts and, additionally, each would receive 25% of Heritage's profits for five years. Each could draw $3,080.00 monthly (with interest-bearing notes) against his 25% share of profits; $50,000 of the cash Petitioner got at closing was pledged until September 3, 1989 in a certificate of deposit with Ambassador, the stock purchaser, to secure repayment of the draw promissory notes if the draws were not covered by the share of profits due Petitioner.

D. Bankruptcy Filing to Avoid Jailing For Failure to Pay Equitable Distribution liber Debt: the Decision to Buy the Exempt Annuity;

In March, 1989 Mrs. Gepfrich petitioned the circuit court to compel Petitioner to pay (as alimony) the $170,000 balance of the equitable distribution award, plus interest; she requested no lien on Petitioner's assets.

The circuit court granted her petition, directing Petitioner to pay the $170,000 by May 21, 1989. However, neither this order nor any other order ever impressed a lien on Petitioner's assets (including the $50,000 certificate of deposit ["the C.D."]) described above) to secure payment of the equitable distribution award or some $59,000 in attorney's fees due Respondents Miller and Miller & Schwartz, P.A.

When Petitioner failed to pay the $170,000 Mrs. Gepfrich scheduled a circuit court hearing on her contempt motion for 3:00 P.M., June 13, 1989. Fearing he might be jailed, Petitioner contacted bankruptcy counsel Samuel L. Heller, June 8, 1989. Heller told Petitioner the bankruptcy trustee would seize the $50,000 C.D. and suggested Petitioner try to get Ambassador's pledge lien released so that Petitioner could convert (before bankruptcy) the $50,000 C.D. into an annuity Petitioner could claim as exempt under §222.14, Florida Statutes (App.-58).

Heller then showed Petitioner the following statement from the legislative history to 11 U.S.C. §522:

> As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.

Petitioner relied on this congressional statement in deciding to purchase the annuity.

E. Florida's Liberality - Treating Insolvent Debtors' Asset Conversions to Exempt Property as Non-Fraudulent.

§222.14, Florida Statutes (App.-58) exempts annuity contracts without limit as to dollar amount. There is no Florida statute or appellate decision requiring that an annuity or homestead be purchased so many months before bankruptcy. The only limitations imposed by case law are that the asset has to be purchased prior to the point in time that a judicial lien has attached and the asset can

not be acquired with stolen funds[4].

Florida Supreme Court decisions even indicate that the insolvent debtor can deliberately and purposely convert business assets[5] into exempt property while a specific judgment creditor is in hot pursuit of the debtor and his assets and that the debtor's intention in placing the property into an exempt medium, and thus beyond the reach of his creditors, is, by its very nature, not a fraud upon creditors but rather, a legitimate exercise of the debtor's right to acquire and enjoy property exempt to him under the constitution and statutes of the state. Lee v. Bradley Fertilizer Co., 33 So. at 459. Accord, Heddon v. Jones, 154 So. 891 (Fla. 1934). See also, Spach v. Kleb, 112 So.2d 21 (3rd D.C.A. Fla. 1959).

The Florida courts even go so far as to

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[4] Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925)

[5] Lee v. Bradley Fertilizer Co., 14 Fla. 787, 33 So. 456 (1903).

uphold the right to acquire and own exempt property as paramount - even where there have been representations to a creditor that certain assets (later liquidated for the asset conversion) would be used for business purposes. Thus, in Lee, the partners of an insolvent partnership deeded partnership lands and chattels to themselves while judgments were being sought by partnership creditors (and later entered against them and the partnership); their homestead purchases were upheld as exempt from levy and sale. Similarly, in Spach, the debtors had operated a partnership and had specifically furnished financial statements to certain creditors representing that the partnership's real property was a part of partnership assets and would be responsible for the debts of the partnership. They then liquidated the realty and operated the business by leasing it to the partnership, using the proceeds from the sale of the partnership land to satisfy mortgage liens against the homesteads of the two

partners and their wives. Nine months after converting the partnership realty into the mortgage paydowns, they filed for bankruptcy.

The trustee sued in state court for an equitable lien against the homesteads equal to the amount of the proceeds derived from the partnership lands. On appeal, the third district court of appeal affirmed dismissal of the suit because the trustee's complaint failed to state a cause of action under Florida law. The court reiterated the Lee rule, stating 112 So.2d at 23:

> [A] party who acquires property with the intention that the law shall exempt it from his debts does not commit a fraud upon his creditors, for to do so would impute to the law an intention to work an injustice.

Accord, Beall v. Pinckney, 150 F.2d 467, 471 (5th Cir. 1945). ["The intention to do what the (Florida) Constitution not only permits but provides, is not an intention to hinder and defraud creditors ... (because) [n]othing has been taken from (the creditors) to which they were entitled...."]

In summary, there are three distinguishing characteristics about the Florida treatment of exemptions and a debtor's right to convert nonexempt assets into exempt property while a creditor is in hot pursuit. First, the exemption is unlimited as to dollar amount and there is no requirement that the exempt asset be acquired a certain minimum amount of time before bankruptcy.

Second, the only limitation is that the conversion from nonexempt to exempt must occur prior to the point in time that a judgment lien has attached to the asset in its nonexempt state. As the Florida Supreme Court stated in Lee v. Bradley Fertilizer Co., 33 So. at 459:

> We think that partners, acting in good faith, have a right to sever their joint interests in the firm property by contract of sale from one partner to the other, or by a division of the property between them, at any time before the firm creditors obtain a lien thereon...and that they may thereafter successfully claim it as exempt from execution, although at the time of the severance, the firm be insolvent.... The title to the property sought to be exempted in this case, though formerly vested in the copartners, was completely vested in each partner, respectively, in severalty, by the deeds of conveyance mutually executed between them; and this (conversion to exempt property) was effected before the acquisition by the complainant of any lien thereon by judgment or otherwise... (emphasis added).

The same principle, that conversion can occur anytime before a judgment or attachment lien is impressed on the nonexempt asset - is set forth in the controlling federal precedent in Florida, Beall v. Pinckney, 150 F.2d 467, 471 (5th Cir. 1945), wherein the court held that since the debtor's home purchase had been consummated "before any actual or constructive seizure by lien (of the home) to pay his debts", 150 F.2d 471, his right to claim the

home as exempt in his bankruptcy was upheld.

Third, the Florida courts have emphatically told creditors how to prevent the problem of extending credit and seeing the debtor then shield his assets from the reach of the creditor's judgment. In Heddon v. Jones, 154 So. 891 (Fla. 1934), the court stated, 154 So. at 892:

> Such contingencies as are involved in this case can be guarded against by (the creditor) either taking an express written lien on the unincumbered property at the time credit is extended, or by beginning a suit and levying an attachment on the land to impress on it an attachment lien ....

F. Purchase of the Annuity 37 Minutes Before Bankruptcy; The Oral Binder for Annuity Coverage; The Cashier's check

On the morning of June 13, 1989 Petitioner got Ambassador to release its pledge lien, Petitioner then receiving a $49,012.09 cashier's check (his half of the $100,000 C.D. less an early withdrawal penalty). The same morning he met insurance salesman Sam Williams (at Heller's office) whom he had recently contacted about the

annuity purchase. He told Williams that morning he had to get confirmation from Williams' insurance company [First Colony Life Insurance Company of Lynchburg, Virginia (hereinafter, "First Colony")] that the annuity purchase would be effective upon Petitioner's signing the application and paying the $49,012.09 purchase price by cashier's check that morning, i.e., before Petitioner would file his bankruptcy petition later that day.

Williams then phoned First Colony's Ft. Lauderdale general agent, Douglas Fuerst who immediately (that morning) called **First Colony's senior vice-president, Linda Mayhew, in Virginia who verbally approved Petitioner's request for immediate annuity coverage** (while Petitioner waited at Heller's office with agent Williams until Fuerst telephoned back that approval had been given).

Petitioner then endorsed his $49,012.09 cashier's check to First Colony and as he handed the signed application and endorsed

check to Williams the latter again assured Petitioner the annuity contract was in effect that morning as Williams would immediately drive the application and check to Fuerst's office in Ft. Lauderdale. Williams did so and at 1:50 P.M. that day (June 13th) Williams transmitted by facsimile a message to Heller and Petitioner (on Fuerst Agency letterhead) that: "Everything is done."

Petitioner signed his bankruptcy papers and his petition was then filed 37 minutes later at 2:27 P.M., June 13, 1989. On June 20, 1989 Petitioner received the original annuity contract from First Colony effective - per Linda Mayhew's verbal assurance - June 13, 1989.

G. Litigation Regarding the Annuity Purchase

Petitioner's adversary suit against his ex-wife sought a determination that the equitable distribution debt was a property settlement debt, and hence dischargeable, not being in the nature of alimony. 11 U.S.C. §523(a)(5)(B); other federal courts have so

ruled.[6] He also sought a determination that his $59,000 attorney's fee debt to Respondents Miller and Miller & Schwartz was dischargeable, as relating to the attorneys' prosecution of the ex-wife's dischargeable property settlement claim. The Respondents counterclaimed for denial of discharge alleging that the annuity purchase was a fraudulent transfer within the year preceding bankruptcy and the trustee filed a separate adversary complaint against Petitioner for denial of discharge, to void the annuity purchase as a fraudulent transfer and alternatively, to void the transfer as a post-petition transfer. [Mrs. Gepfrich also filed an objection to the Petitioner's claim in his bankruptcy schedules that the annuity was exempt.]

H. Petitioner's Conflicting Testimony: Significant or Not Significant?

At a consolidated trial on the foregoing

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[6] In re Kaufman, 115 B.R. 435 (Bankr.E.D.N.Y. 1990); In re Macys, 115 B.R. 883 (Bankr.E.D.Va. 1990).

claims and objections (and the Trustee's claim for recovery of $25,000 Petitioner took in post-petition draws against his anticipated share of profits - discussed **infra** on Page3 42-43), all of the facts described above were established without dispute. The only conflict in the evidence related to the **date** the Petitioner first learned he could get the $50,000 C.D. released from Ambassador's pledge lien. At trial, Petitioner and Ambassador's President, Steve Epple, both testified that on June 9, 1989 (the day after Petitioner met attorney Heller), Petitioner met with Epple and then requested (for the first time) that Ambassador release the pledge lien (which was then due to expire in eighty-six days, on September 3, 1989) so that Petitioner could buy an annuity with his $50,000 and then file his Chapter 7 bankruptcy. In an earlier summary judgment affidavit, however, Petitioner made a conflicting statement (as to the date he learned he could get the pledge lien released). He stated the following, in

Paragraph 7:

> I informed Mr. Heller, however, that - long before I even thought of filing a bankruptcy - Mr. Blum and I had already had informal discussions with represent-atives of Ambassador Real Estate Equities Corporation about the fact that Mr. Blum and I really would appreciate it if Ambassador would release the pledge lien earlier than September 3, 1989; and I also told Heller that Ambassador's repre-sentative, Steve Eppel, had already told Blum and myself in approximately May, 1989 that any time we wanted the pledge lien released Ambassador would release it gratuitously - without anything being paid to Ambassador, so that we (Blum and I) could get our $100,000 released whenever we wanted it. (emphasis added)

Even though this affidavit indicated the Petitioner knew in May, 1989 he could get the pledge released, the bankruptcy court interpreted this statement as indicating that a month earlier, in April, 1989, Petitioner knew he could get the pledge lien released. The bankruptcy judge had difficulty with this time gap of a month and resolved it by finding that even if Petitioner didn't know before June that he could get the pledge lien released earlier than the September 3, 1989

scheduled date for expiration of the pledge lien, Petitioner **believed**[7] he could get it released early!

In its findings of fact and conclusions of law (App.-28, 31-32), the bankruptcy court criticized Petitioner for his inconsistent

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[7] At the August, 6, 1990 hearing on Petitioner's motion to alter or amend the two adversary final judgments, the bankruptcy judge indicated admitted he was unable to determine whether Petitioner **knew** or **believed** anytime prior to the his June 9, 1989 meeting with Ambassador's Epple that he (Petitioner) could get the pledge lien released:

MR. HELLER: The point is, Your Honor indicates that he defrauded Mrs. Gepfrich. In order for him to have defrauded Mrs. Gepfrich he would have to have known by virtue of communications with Ambassador prior to June that he could get the monies. There is no ---

THE COURT: Well, that is what I believe he did; I believe that he knew prior and that he defrauded her.

MR. HELLER: That he knew that he would get the money before that date?

THE COURT: **I believe that he** had, at least **either knew it or believed it** - (emphasis added) (Tr. 8/06/90, P 16, L 16-25, P 17, L 1-3)

testimony - contrasting his summary judgment statement with testimony the debtor gave to the state court in the dissolution case a month earlier (April, 1989). The bankruptcy court does not refer to any statements the debtor made to anyone in **May**, 1989, but rather to his testimony before the state court in the dissolution proceeding in April, 1989. The debtor, however, was never asked in the following exchange anything concerning whether he had the **ability** to get the pledge lien released earlier than its September 3, 1989 expiration. The exchange indicates he was only asked **when** the $50,000 would be distributable to him (free of the pledge lien) under the parties' September 3, 1987 stock purchase agreement. His statements were correct - especially his statement that major losses Heritage was then experiencing in 1989 might mean he had failed to earn his draws (because, in fact, Heritage made no profit in 1989: **it lost $1,743,711**. Here, then is the testimony that - according to the bankruptcy

court - "mislead" Mrs. Gepfrich (who never testified she was mislead and who, upon learning about the $50,000 C.D. at this April 17, 1989 hearing, took no action whatever to have the circuit court impress it with a lien in her favor - even though that court's dissolution judgment had expressly told her she could come back and request a lien if Petitioner ever defaulted in paying his debts to her!) Here, then is the testimony that cost Petitioner his bankruptcy discharge:

[Cross examination by Val Osinski, Esq., counsel for Marjorie Lois Gepfrich]:

Q Sir, there's (a) $100,000 Certificate of Deposit at Ambassador Savings and Loan in your name and your partner's name, correct, sir?

A That is correct.

Q When does that come due?

A I believe it's September. I would say if you take the buy-sell agreements, I believe it's September.

Q. That's correct. It's two years after it

closed, $100,000 C.D.. Half of that is yours, right?

A That's correct. (Cir. Tr. 4/17/89, P 54, L 24)

* * *

Q And you got 50,000 coming from this C.D., right, in September?

A In theory, yes.

Q The reason you say in theory is what, sir? Why do you say in theory?

A Well, I had major losses between now and then. They don't have to release it.

Q In other words, they can hold back --

A Sure.

Q -- if you don't meet - if you lose money?

A Uh-huh, that's correct.

Q When is the last time Heritage Construction ever lost any money?

A It lost it last quarter. (Cir. Tr. 4/17/89, P 63, L 15-25; P 64, L 1-9)

I. Bankruptcy Court's Rulings on the Annuity Purchase

The bankruptcy court made separate findings of fact and conclusions of law in each of the two adversary suits. In the case involving the counterclaim for denial of discharge by Mrs. Gepfrich and her attorneys, the bankruptcy court concluded (App.-13, 20) because the local insurance agent didn't have authority to deposit Petitioner's cashier's check and had to ship the same with the application to the insurer in Virginia and the check didn't clear until several days after bankruptcy, the annuity purchase was a post-petition transfer voidable by the trustee under 11 U.S.C. §549. (App.-20, 25-26). The court made no mention of the evidence indicating an oral binder for annuity coverage had taken effect several hours before the bankruptcy was filed. [In making these findings the bankruptcy court ignored the fact that oral insurance binders are recognized in

Florida by decisions[8] holding that when a prospective insured pays the premium requested by the agent, completes the application on the form prescribed by the insurer and is assured by the agent that insurance coverage has then taken effect (as Petitioner was so assured herein), the insurer is bound as of that instant.]

The court also stated (App.-23):

> This Court follows those decisions which have denied a debtor's discharge which found extrinsic fraud such as where there was a diversion of business assets into exempt property or where borrowed monies are placed into exempt property. See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer, 2 B.R. 309 (Bankr. WA 1980); In re Collins, 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford, 773 F.2d 52 882 (4th Cir. 1985); In re Smiley, 864 F.2d 562 (7th Cir. 1989). Here, after considering the amounts involved, the timing, the fact that the proceeds were derived from marital assets the wife had an interest in, the misleading impression given to the wife and the

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[8] Hughes v. Pierce, 141 So.2d 280, 282 (Fla. 1st D.C.A. 1961); Russell v. Eckert, 195 So.2d 617 (Fla. 2nd D.C.A. 1967); and Fidelity and Casualty Co. of New York v. Britt, 393 So.2d 41 (Fla. 3rd D.C.A. 1981)

> state court as to the avail-ability of the certificate of deposit and the insolvency of the Debtor clearly supports the conclusion that the Debtor's actions, in converting the certificate of deposit into the annuity, were done with the requisite fraudulent purpose to hinder, delay and defraud the wife and MILLER. For the Court to conclude otherwise would set the precedent to allow parties obligated under marital decrees to convert all of the marital properties into annuities or exempt property to avoid the obligations called for under such decrees.
>
> The Debtor argues that the prior ruling of In re Blum, 41 B.R. 816 (Bankr. S.D. Fla. 1984) should govern this case. In Blum the Court stated the mere act of converting property into exempt property, without more is not prohibited by the Bankruptcy Code. Here the facts and circumstances are clearly distinguishable from those presented in Blum.

Judgment was entered denying discharge (App.-12).

In the trustee's adversary suit to avoid the transfer, the court also rendered findings of fact and conclusions of law (App.-28), wherein the court added two other circumstances as the basis for the invalidation of the annuity purchase: The court's conclusion that the transfer did not

occur until the check was honored post-petition by the bank that issued the cashier's check (App.-35-36). However, in ruling that ownership of the money evidenced by the cashier's check did not pass until the check was cleared, the bankruptcy court made no mention of Florida decisions of the Fifth Circuit[9] and the Eleventh Circuit[10] holding that title to a cashier's check passes on delivery to the payee or endorsee since acceptance of a cashier's check occurs when the bank issues the same - not when the check is returned to the bank.

As an additional basis for its conclusion that this was not permissible pre-bankruptcy planning but was a fraudulent transfer, the court noted (App.-37) that:

> This transfer of non-exempt assets into an exempt annuity was a

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[9] State of Pa. v. Curtiss Nat. Bank of Miami Springs, Fla, 427 F.2d 395 (5th Cir. 1970)

[10] Nicholson v. First Investment Co., 705 F.2d 410 (11th Cir.)

> fraud with regard to the debtor's ex-wife and her attorneys who had been trying to reach this particular asset earlier. (emphasis added).

[Contrary, however, to this finding, the ex-wife never made any attempt to proceed against this asset or any particular asset; the only thing Respondents secured was an in personam order requiring the debtor to pay by May 21, 1989 the debt which the debtor regarded as a fully dischargeable property settlement debt.]

For these reasons, the bankruptcy court entered judgment invalidating the annuity purchase, both as a fraudulent transfer under 11 U.S.C. §548 or alternatively, as a post-petition transfer under 11 U.S.C. §549, and denied the debtor's discharge under 11 U.S.C. §727(a)(2)(A).

J. Litigation Regarding the $25,000 in Post-Petition Draws by Petitioner

In 1988 Petitioner's $3,080 monthly draws against his share of Heritage's profits were covered - his share of 1988 profits exceeded his $3,080 monthly draws and he duly reported his 1988 profit distribution as income on his

tax return. In 1989, however, Heritage lost $1,743,711 such that $25,000 he received post-bankruptcy (June 13-December 31, 1989) in monthly draws was not covered because there were no profits; he remained indebted (on promissory notes) to repay this post-petition debt of $25,000 to his employer.

Petitioner's right to receive annually 25% of profits was not unconditional. The 1987 stock purchase agreement provided that if Petitioner ever terminated his employment under the separate five-year employment contract (executed the same day as the stock purchase agreement) Ambassador had the right to terminate all further distributions of profit to Petitioner. Petitioner had claimed as exempt wages due himself as head of a family [under §222.11, Florida Statutes (App.-58)] his right to receive these post-petition draws. Mrs. Gepfrich objected to this exemption claim.

K. Bankruptcy Court's Rulings Regarding $25,000 in Post-Petition Draws

In its memorandum decision sustaining objection and supplemental objection to exemptions of July 6, 1990 (App.-5) the bankruptcy court overruled Petitioner's claim that his Contingent Purchase Price payments (his 25% share of profits - evidenced by the $3,080 monthly draws) were exempt wages under §222.11, Florida Statutes (App.-58), which exempts wages due the head of a family from garnishment or other legal process. The court stated (App.6-7):

> The evidence is undisputed from a review of the debtor's tax returns, that he receives two different forms of compensation from Ambassador. One form of compensation is treated clearly as wages, which constitutes compensation under the employment agreement. This is listed as wages on his tax returns. The other form of compensation is under the stock purchase agreement. This is treated by the debtor on his income tax returns as installment sale income. The debtor is bound by his tax returns and cannot now claim the stock purchase proceeds as wages. Therefore, the objection to this exemption is sustained.

By a separate turnover order (App.-7) the court ordered the Petitioner to turn over all

monies received under the stock purchase agreement since the date of bankruptcy. As Petitioner had used all of the $25,000 to pay Mrs. Gepfrich $5,000 monthly payments of alimony and child support and his living expenses he was unable to turn over the $25,000 to the trustee who then secured a $25,000 money judgment (App.-9) against Petitioner.

All of these various orders were appealed to the district court which affirmed them (App.-44) in August, 1992. The district court concluded that under 11 U.S.C. §727(a)(2) a Petitioner's right to convert non-exempt property into exempt property was "limited by the power of the bankruptcy court (under 11 U.S.C. §727(a)(2) to deny a discharge if there was extrinsic evidence of the Petitioner's intent to defraud creditors." (App.-48) The district court invoked the clearly erroneous rule (App.-48) and thus refused to upset the bankruptcy court's finding of fact Petitioner had made the conversion with intent to hinder,

delay or defraud Respondents.

Petitioner appealed to the court of appeals which affirmed per curiam (App.-53) the district court's affirmance order.

REASONS FOR GRANTING THE PETITION

There is something radically wrong with a bankruptcy case (such as the instant case) where the debtor confers with experienced bankruptcy counsel, reads the statement of Congressional intent that appends 11 U.S.C. §522 (indicating that conversions of nonexempt property into exempt property "before" bankruptcy are permitted) and then acquires an exempt asset with his cash not then under any judicial lien, only to learn months later in his bankruptcy that he has thereby forfeited his discharge! The problem stems from the fact that the Bankruptcy Code does not address this question and many bankruptcy judges are simply outraged at the unlimited nature of state laws preserving exemption privileges to

insolvent debtors.

There are six specific reasons why this court should grant certiorari and make a determination as to whether it will restore order to this chaotic landscape that now lies before both debtors contemplating bankruptcy and wishing to maximize their state law exemptions and their counsel, who must advise the unfortunate debtor in making decisions that can have critical and devastating consequences if the wrong path is chosen (or if his bankruptcy case ends up on the docket of a bankruptcy judge who does not look kindly upon asset conversions on the eve of bankruptcy):

I. The Decision of the Court of Appeals Conflicts with Prior Decisions of The Supreme Court

This court, on numerous occasions, has reiterated that the validity and scope of a debtor's exemptions are controlled by state law. Thus, in Holden v. Stratton, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018 (1905) Mr. Justice White stated, 25 S.Ct. 659:

> It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws.
>
> From the organization of Federal courts under the judiciary act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the state.... The same rule has obtained under the bankruptcy acts, which have sometimes increased the exemptions... but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction. (emphasis added)

Accord, Meyer v. United States, 375 U.S. 233, 84 S.Ct. 318, 11 L.Ed.2d 293 (1963); Hanover Nat. Bank v. Moyses, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113 (1902). There is no way that one can rationally reconcile the affirmances by the district court and court of appeals below of the bankruptcy court's rulings with the Supreme Court's holding that state exemption laws are to be given full

effect. How can the Congressional statement that a pre-bankruptcy asset conversion of a debtor's assets to exempt property mediums is not fraudulent have any meaning whatever if a bankruptcy court is allowed to engraft onto the whole scheme of state law asset conversion rights the traditional indicia or badges of fraud? The need for a resolution of this conflict is apparent.

II. The Decision of the Court of Appeals Conflicts on an Issue of State Law With Decisions Rendered by the Florida Supreme Court

When one compares the factual circumstances cited by the bankruptcy court in the instant case (the fact that the debtor was insolvent, that Respondents were in hot pursuit of the debtor in state court, and that although no **lien** had ever been impressed upon the debtor's assets, the debtor was still under some type of quasi-lien restriction because the circuit court had "entrusted the assets to the Petitioner to afford him maximum flexibility in discharging his obligations to

his ex-wife..." with the objective standards prescribed by Florida's Lee v. Bradley Fertilizer Co., 14 Fla. 787, 33 So. 456 (1903) and Heddon v. Jones, 154 So. 891 (Fla. 1934), it is apparent that the **effect** of the court of appeals' per curiam affirmance of the district court's opinion [and the district court's reliance on Norwest Bank Nebraska, N.A. v. Tveten., 848 F.2d 871 (8th Cir. 1988)] is that there is an irreconcilable conflict between the instant decision of the court of appeals and the latter two Florida decisions. Where such conflict exists, certiorari should be granted to resolve the conflict, particularly where, as in the instant case, this court has held that state law must be given full effect in the implementation of exemptions from creditors' claims. Holden v. Stratton, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018.

The extent of the conflict is also reflected in many of the inconsistent rulings by bankruptcy courts which attempt to reconcile, on the one hand, the rule that a debtor may

convert nonexempt assets to exempt assets on the eve of bankruptcy with what these courts sometimes find is a specific intent to hinder, delay or defraud a creditor. Thus, even though the Florida Supreme Court's decisions in Lee and Heddon do not deny or abridge the debtor's right to conver the nonexempt assets because of pending litigation, bankruptcy courts frequently cite this factor as one of the "indicia or badges of fraud" that may preclude the bankruptcy court's allowing the debtor to receive his discharge. In re Geffen, 35 B.R. 368 (Bankr. S.D. Fla. 1984); In re Schwarb, 150 B.R. 470 (Bankr. M.D.Fla. 1992).

There are only two ways to resolve this chaotic situation: Congressional action to, e.g., amend §522 of the Bankruptcy Code (as recommended by Prof. Resnick in his law review article, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L.Rev. 615, 651 (1978) (by presuming that conversions of nonexempt

property to exempt property occurring more than 90 days before the bankruptcy filing are valid and non-fraudulent and limiting conversions within the 90-day period to the extent "that such acquisition, improvement or increase in value [resulting from the conversion] exceeds the reasonable needs of the debtor or his dependents") Resnick, Id. at 651.

The other alternative is for this Court to recognize that until such time as there is a legislative solution, the federal courts cannot substitute their judgment for that of the state legislatures or the Congress. This is precisely the approach that was adopted by this court in Taylor v. Freeland & Kronz, ___ U.S. _____ , 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992), wherein the court noted that Congress, not the federal courts, had the authority to limit the application of 11 U.S.C. §522(l) to exemptions claimed in good faith. The court rejected the argument that it could judicially engraft into the statute a requirement of good

faith by stating, 112 S.Ct. 1648:

> These provisions may limit bad-faith claims of exemptions by debtors. To the extent that they do not, Congress may enact comparable provisions to address the difficulties that (the trustee) predicts will follow our decision. We have no authority to limit the application of Section 522(l) to exemptions claimed in good faith. (emphasis added)

So, too, should this court address the issue of whether a similar measure of restraint against judicial activism should be the rule of law in addressing the question: is there a federal common law of fraudulent transfers that allows a bankruptcy court to ignore the state law of the debtor's domicile as being the sole standard for assessing the propriety of his pre-bankruptcy conversions of nonexempt property to exempt property mediums? The need for a resolution of the conflict is acute.

How can one reconcile the statement by the bankruptcy court below, that: (App.-23,24)

> This court follows those decisions which have denied a debtor's discharge which found extrinsic fraud such as where there was a diversion of business assets

> into exempt property or where borrowed monies are placed into exempt property. See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer, 2 B.R. 309 (Bankr. WA 1980); In re Collins, 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford, 773 F.2d 52 882 (4th Cir. 1985); In re Smiley, 864 F.2d 562 (7th Cir. 1989). (emphasis added)

with the holding of both the Florida Supreme Court's decisions in Lee and Heddon, and Spach v. Kleb, 112 So.2d 21 (3rd D.C.A. Fla. 1959), which clearly sanction a debtor's liquidation of business assets and his application of the proceeds from such liquidation to either purchase an asset exempt under Florida law or reduce a mortgage on his exempt asset? It is impossible.

III. The Present Situation in Bankruptcy Practice is Chaos and Uncertainty Among The Bankruptcy Courts; Debtors' Rights To Enjoy Effective Legal Counsel From Bankruptcy Practitioners is Jeopardized By the Uncertain Climate Now Present

Both jurists and legal scholars have noted the chilling effect this chaos, this absence of a definitive standard of law, has on the bankruptcy bar and on the right of

debtors contemplating bankruptcy of securing effective and competent legal counsel. There are no cases more illustrative of the problem now before this court than the two cases decided the same day by the Eighth Circuit: Hanson v. First National Bank, 848 F.2d 866 (8th Cir. 1988) and Norwest Bank Nebraska, N.A. v. Tveten., 848 F.2d 871 (8th Cir. 1988). [Tveten, incidentally, is the very case that the district court relied on below in the Gepfrich case to support its conclusion that a debtor's right to convert nonexempt property into exempt property "is limited by the power of the bankruptcy court to deny discharge if there is extrinsic evidence of the debtor's intent to defraud creditors." (App.-48)]

In these two cases, both debtors were doctors, engaged in the same ill-fated real estate ventures and both owed the same $19,000,000. Both used the same bankruptcy counsel; both engineered roughly $700,000 into assets then exempt under Minnesota law. Dr. Tveten lost his discharge but Dr. Hanson

received his. The reason: they drew different bankruptcy judges and both judges' findings were held not "clearly erroneous" in appeals to the District Court. In his dissenting opinion in Tveten, 848 F.2d 877-879, Judge Arnold pointed out the folly of bankruptcy judges attempting to fashion factual findings of fraud to debtors exercising their exemption privileges is discussed in depth. Judge Arnold approved the following statement by Judge Kishel in In re Johnson, 80 B.R. 953 (Bankr.D.Minn. 1987) which seems most appropriate to the instant case:

> The legislative branch alone determines what is necessary ... to meet a debtor's needs, by establishing the nature and value of the property subject to claims exemption.... To deny discharge for a debtor's non-fraudulent invocation of these protections is, overtly or covertly, to make a political and/or value judgment on these legislative determinations. To equate a non-fraudulent intent to 'place assets beyond the reach of creditors' with an invidious intent to 'hinder or delay creditors' is ultimately to frustrate statutory exemption rights by causing a chilling effect on the full exercise of those rights. A court which causes such a chilling

> effect is, in a very real sense, invading legislative prerogatives by substituting its own judgment for that of the legislature.

Surely, the substantive law of Florida is frustrated by the bankruptcy court's decision below. In like measure, the intent of Congress, in formulating the following statement of legislative intent:

> As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.[11]

is equally frustrated by the decision below.

In his article, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property

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[11] Reports to the Congress of both the Committee on the Judiciary, Senate Report No. 95-989 (reprinted in Collier Bankruptcy Code Rules and Forms (1991 ed.), page 157 and of the Committee on the Judiciary, House Report No. 95-595 (reprinted in the Collier pamphlet at page 159)

on the Eve of Bankruptcy,[12] Prof. Resnick states, 31 Rutgers L.Rev. at 643:

> Lack of uniformity in use by some courts of the nebulous purpose test to determine the nature of the debtor's conduct hampers the attorney's ability to predict with certainty when actual fraud relating to a particular conversion of nonexempt to exempt property will be found. When uncertainty is combined with the risk that a court might deprive the debtor of a discharge of his debts, the result is a chilling effect on the debtor's counsel in advising his client.

IV. The Present Absence of Definitive Guidelines for Reconciling the Competing Policy Considerations of Denying Discharge to Debtors Who Fraudulently Transfer Their Property With the Policy of Preserving As Inviolate State Law Exemption Rights is Chaos; Large Numbers of Debtors are Faced With Great Uncertainty in Attempting to Secure the Bankruptcy Fresh Start

One need only review the principal law review articles that have been written on this subject to recognize that the decision of the court of appeals for the eleventh circuit does, indeed, involve a question that is plaguing the bankruptcy bench and bar

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[12] 31 Rutgers L.Rev. 615, 651 (1978)

throughout this country. Scores of cases involving the unanticipated loss of discharge are recounted in two law review articles[13]. The problem is not abundantly dealt with by decision of the courts of appeal in more recent years, and this is due, in all likelihood, to the unfortunate application of the "clearly erroneous" rule which acts as a bar to meaningful appellate analysis of this real dichotomy between state and federal laws. The very fact that so many debtors are threatened with loss of their discharge; the very fact that the discharge itself is perhaps the most valuable incident of the unfortunate debtor's journey through the bankruptcy maze; and finally, the fact that our courts have generally recognized that in determining if a debtor has made a fraudulent transfer, the

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[13]Koger and Reynolds, Is Prefiling Engineering Prudent Planning or Section 727 Fraud? (Or, When Does a Pig Become a Hog?), 93 Comm. L.J. 465; and Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L.Rev. 615 (1978).

general rule is "a debtor who acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge of his debts." Hultman v. Tevis, 82 F.2d 940, 941 (9th Cir. 1936); In re Nerone, 1 B.R. 658, 660 (Bankr.S.D.N.Y. 1979). All of these factors demonstrate the urgent need for the Supreme Court to once and for all resolve the conflict and restore order so that the lower federal courts (the bankruptcy courts, in particular) can discharge their duties as the courts of first instance in the bankruptcy system and dispatch justice to both debtors and creditors (and their legal counsel) who crave certainty and stability as they participate in the bankruptcy process.

V. The Decision of the Court of Appeals Conflicts with Decisions of Other Courts of Appeal; Additionally, the Decision Below Conflicts with the Second Circuit's Decision on the Extent to Which The Clearly Erroneous Rule Bars Condemnation of a Debtor's Pre-Bankruptcy Asset Conversion

As noted by Collier[14], many decisions[15] of the federal circuit courts of appeal have consistently held that conversion of assets

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[14] 3 Collier on Bankruptcy (15th ed.), Section 522.08[4] (Acquisition of Property to Secure Exemptions) states:

> Under section 522, the debtor may convert nonexempt property into exempt property immediately before the commencement of the case under title 11. **An eleventh hour acquisition of exempt property will not require disallowance of exemption in such property** .... (emphasis added)

See also 4 Collier on Bankruptcy (15th ed.), Section 727.02(a) (Conversion of Non-Exempt Property to Exempt Property).

[15] See, e.g., Forsberg v. Security Bank, 15 F.2d 499 (8th Cir. 191926); In Re Jackson, 472 F.2d 589 (9th Cir. 1973); Wudrick v. Clements, 451 F.2d 988 (9th Cir. 1971); Love v. Menick, 341 F.2d 680 (9th Cir. 1965); and In re Adlman, 541 F.2d 999 (2nd Cir. 1976).

immediately before bankruptcy into an exempt medium is permitted at the "eleventh hour" or on the "eve of bankruptcy" - even when the debtor is insolvent; even when the creditors are hounding him; and even when the purchase of the exempt asset is made for the express purpose of putting it out of the reach of his creditors. See, e.g., Crawford v. Sternberg, 220 F.2d 73 (8th Cir. 1915).

The decision of the court of appeals below cannot be reconciled with these decisions because the factors cited by the bankruptcy court below (the debtor's insolvency, the fact that the Respondents were in hot pursuit, and the fact that the debtor's express purpose of acquiring the annuity was to put it out of the reach of Respondents) are the very same factors that the Second, Eighth and Ninth Circuits have all held in these cases are irrelevant. The conflict is real and irreconcilable.

While findings of **fact** by a bankruptcy judge are not to be set aside unless clearly

erroneous, Bankruptcy Rule 8013, the bankruptcy court's finding below that the "Debtor's actions, in converting the certificate of deposit into the annuity, were done with the requisite fraudulent purpose to hinder, delay and defraud the wife and MILLER" was clearly erroneous because this "factual finding" resulted from the bankruptcy judge applying the wrong rule of law in the instant case. This is precisely the same error that confronted the Second Circuit in In re Adlman[16]. In contrast to the Second Circuit's realistic approach in Adlman, the district court below applied the "clearly erroneous" rule and would not disturb the bankruptcy court's findings of "fact". This type of reasoning begs the real question: Whether the debtor's conduct was

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[16] The Second Circuit in Adlman disregarded the bankruptcy judge's finding of fact that Mrs. Adlman intended to defraud creditors (when the record demonstrated that what she intended to do was to convert non-exempt property into an exempt property medium) since, as the Second Circuit stated, "(this) finding (by the bankruptcy judge) ... was induced by an erroneous view of the law." 541 F.2d 1005 (emphasis added)

fraudulent by its very nature? As demonstrated above, by reference to Florida decision law, which should be applied in accord with this court's mandate in Holden, Meyer v. United States, and Hanover National Bank, the bankruptcy judge's finding of "the requisite fraudulent purpose" by Petitioner was clearly "induced by an erroneous view of the law." The conflict with Adlman is irreconcilable and should be addressed by this Court.

VI. The Result Below Is Unduly Harsh And Is The Product of an Erroneous Decision By The Court of Appeals

Surely, there would have to be very few instances in bankruptcy jurisprudence where such an avalanche of unanticipated dire consequences is visited on the head of an unfortunate debtor such as the Petitioner. His sin was simply that he relied upon a statement of Congressional intent and clear definitive Florida decisional precedents that seemed to chart a path he could take with impunity - and certainly, without the fear that by filing

bankruptcy, he would forfeit his discharge! The result is unbelievably harsh and devastating, particularly when one looks at the innocuous exchange in the Petitioner's testimony in state court on April 17, 1989, when Petitioner was being questioned by Mrs. Gepfrich's counsel, Val Osinski, about the $100,000 C.D. There is no way that one can rationally read these few pages from the transcript of testimony (Petition, **supra**, pages 36-37) and conclude that anyone was misled about the C.D. by anything Petitioner stated that day. It simply stretches the bounds of human reason to sanction a bankruptcy judge's turning this dialogue into the instrument by which the precious right of a bankruptcy discharge is forfeited. If the essence of a fraudulent transfer is that a creditor has somehow been misled or deceived by the debtor, then surely this Court should address the case below to then answer the question: How could Mrs. Gepfrich be misled if she never even bothered to ask the circuit court to impress a lien on

or attach the $50,000 C.D.?

The devastation that now marks Petitioner as he is saddled forever with hundreds of thousands of dollars in debt, is enormous, and should furnish an additional basis for a decision by this Court to grant certiorari.

Finally, although the importance of this case to the bankruptcy bench and bar of this country and the need for a resolution of the competing state law exemption and federal fraudulent transfer prevention policies described above should alone persuade the Court to grant certiorari, the Supreme Court should also grant certiorari because all of the other holdings by the bankruptcy court were erroneous. The bankruptcy court ignored the Florida law relating to oral binders for insurance coverage and the rule that title to a cashier's check passes when the check is endorsed and delivered, not when the check clears the issuing bank.

Finally, its decision to allow the trustee to recover a $25,000 judgment for monies

the debtor **borrowed** post-petition, monies that he had the right to borrow only if he continued to render personal services under his employment contract, ignored the provision of 11 U.S.C §541(a)(6) that excludes from "property of the estate" of a debtor all earnings stemming from performance of personal services post-bankruptcy. It also ignored the fact that the so-called property interest (the right to receive what the stock purchase agreement characterized as "contingent purchase price payments") turned out to be not an asset at all, but rather a debt. The agreement provided that so long as there were profits that exceeded his draws, the debtor had the right to keep his draws. As there was only a $1.7 million loss experienced by Petitioner's employer in 1989, his draws, under the very terms of the stock purchase agreement, were never anything more than what was evidenced by the interest-bearing promissory notes the debtor executed, **a debt**.

There is no authority in bankruptcy

jurisprudence for the proposition that a debtor's right to borrow monies post-petition is an asset of the bankruptcy estate and additionally, any contractual payments that a debtor is entitled to receive because of the performance of personal services are rights that do not pass to the debtor's estate but are retained by the debtor, free of any claim by the bankruptcy trustee. In re Noonan, 17 B.R. 793 (Bankr. S.D.N.Y. 1982).

For all of these reasons, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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